DOCKET NO. CV 08-501327-S		SUPERIOR COURT
MARSAM METAL FINISHING COMPANY		JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	at NEW BRITAIN
C PRODUCTS, ET AL[1]	:	MARCH 31, 2010

MEMORANDUM OF DECISION

This is an action by the plaintiff, Marsam Metal Finishing Company, (Marsam), against the defendants, C Products, LLC, (C Products), a limited liability corporation, and Barry R. Bergen, (Bergen), and Lawrence Panka (Panka). The operative complaint dated October 21, 2008, is in two counts, both alleging a breach of contract; the first count against C Products, and the second count against Bergen and Panka as guarantors. The defendants filed an answer dated January 12, 2009, setting forth four special defenses to the breach of contract claim. They allege conflict of interest, failure to perform obligations under the contract, shoddy work, and commercial unreasonableness of the contract.

A court trial was held on January 27 and 28, 2010. Both the plaintiff and the defendants were represented by counsel. At trial, the court heard testimony from six witnesses. Subsequently, each party submitted post-trial briefs, as well as the plaintiff

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[1] The plaintiff filed a motion to correct the court file with the court subsequent to the court trial. The court file and the judicial website only listed two of the three defendants as parties. Without objection, the court granted the motion in order to correctly list all defendants: C Products, LLC, as well as the individual defendants, Barry Bergen, and Lawrence Panka.

submitting a rebuttal to the defendant's brief.

I

FINDINGS OF FACT

"In a bench trial . . . the court sits as the trier of fact . . ." (Internal quotation marks omitted.) *Knock v. Knock*, 224 Conn. 776, 793, 621 A.2d 267 (1993). The court makes the following findings of fact.

The plaintiff, Marsam, is a small "job" shop in New Britain that anodizes and coats metal and aluminum parts. Its owner is Jonathan Scalise (Scalise). The defendant, C Products, sells magazines which hold and feed bullets into automatic and semi-automatic weapons. C Products was started in 2004 by Bergen and Panka, operating the business out of Bergen's basement. In May or June, 2004, Scalise was approached by Bergen, who asked whether Marsam would be interested in doing the coating for the magazines and floor plates,[2] that C Products was selling. Scalise agreed, and shortly thereafter, in January, 2005, C Products rented space in the building where Marsam operated its business on an oral month to month basis. The parties agreed to a price for the most popular coating – anodizing and dry coating at $1.30 per unit.[3]

C Products business grew steadily right from the beginning, and Marsam did not

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[2]These "floor plates" are also referred to as base or bottom plates.

[3]The process is a two step process: anodizing, which is always the same, and coating, which is the variable. The process initially provided was a moly-coating.

initially have the equipment to satisfy the needs of the higher volume of parts it was asked to process. Scalise was assured by Bergen and Panka that "this thing is going to go off the charts," and that "he was going to be a player," coming in on the ground floor. Scalise invested approximately $750,000 in customized tooling, equipment and upgrades to his building, *solely* to perform the defendants' work. He installed a large scale anodizing machine, put an addition on to his building, installed electrical upgrades to handle the tremendous power demands, and purchased a "dip coating line." Because C Products was located in Marsam's building, Bergen and Panka were aware of the investment Scalise was making to accommodate their rapidly expanding business.

As C Products space needs changed, they eventually took over the whole building. Scalise increased their rent, which was still on an oral month-to-month basis, and C Products was consistently delinquent on their rental payments as well as payments on the services performed by Marsam on their products. In June, 2006, Marsam was owed approximately $209,000, and about $170,000 of it was over 30 days term. Although the parties enjoyed a good relationship, Scalise was concerned and nervous as he had a "ton of money on the line," so he asked for a written contract to protect his company. At that point, Bergen and Panka offered Marsam more money per piece, and Scalise was told "give yourself a healthy number; we are all going to make a lot of money." The initial contract was a five year term, with a contract price of $1.56 per magazine, and $.20 per base plate.

The volume of sales continued to increase in 2007, and the defendants' account was

continually behind in payments. At that point, Panka started to suggest that he was going to move C Products down to Florida, as the taxes in Connecticut were too high. He also indicated that he was going to take the company in a different direction, as they were coming up with a different series of products. Scalise again began to become concerned, and was looking for more assurances. A new contract was signed, extending the term from five years to ten years. Most importantly, the new contract gave Marsam the exclusive right to provide coating services on the parts and components of C Products, including any new or different coating processes that [would be] needed. (Plaintiff's Exh. 1). In addition, Bergen and Panka each signed personal guarantees regarding the contractual obligations of C Products. (Plaintiff's Exh. 2). Again, neither Bergen or Panka argued about the terms or the exclusivity provisions. Scalise was told, "he was their coater." The volume of work continued to increase through 2008, and C Products' account grew to over fifty percent of the Marsam's total business.

Scalise drafted the contract himself, did not provide any advice to Bergen or Panka, and did not submit any bill for the drafting of the contract.

In early 2008, C Products moved out of the building owned by Marsam, and relocated to their own building in Newington, Connecticut. At that point, C Products owed Marsam approximately $280,000, with $180,000 over terms. The first half of 2008 was very busy, and in late spring, the parties had a meeting at which time Scalise was told that the volume was going up, and his company would need to produce 6,000 to 7,000 parts per day. To

accommodate its best customer, Marsam spent $150,000 on another machine, and added a second shift. An e-mail on June 13, 2008, from Gary Young, an employee of C Products, to Scalise, (with copies of the e-mail sent to Bergen and Panka), indicates C Products' request for Marsam to supply them with 6,000 parts per day. (Plaintiff's Exh. 9). Four days later Bergen sent an e-mail stating: "Johnny Boy, Congrats you made 6 + today. Thank every one there for their efforts." (Plaintiff's Exh. 10).

In July and August, 2008, the volume started to taper off, so much so that Marsam had to lay off the second shift employees. Bergen was reporting, however, that C Products was "still busting at the seams" with tremendous demand. Scalise communicated with C Products that there were no parts arriving at Marsam to be coated. E-mails from July and August were sent by Scalise to Bergen and Panka documenting the lack of incoming magazines and floor plates. (Plaintiff's Exh. 12 to 15). At this time, the debt owed to Marsam had reached $464,000. At the same time, C Products contacted Modern Metal Finishing (Modern), another anodizing facility in Connecticut, giving them the opportunity to process some samples. The president of Modern, Bruno Perin, testified that it began doing some sample runs in July or August, 2008, and the work started "flowing pretty nicely."

On August 8, 2008, Scalise discovered that floor plates had been sent to Modern Metal for coating and finishing. When Scalise confronted Bergen, he indicated this was simply an oversight – "a needle in the haystack" – and stated he had not been looking over that aspect of the business, and someone else had sent the plates to Modern. Then Scalise

discovered another batch of plates that were processed by Modern on August 21. At this point, Scalise telephoned Bergen and told him that there was a major problem: he was owed "a ton of money," and they were breaking the contract. Understandably, Scalise was very concerned as he had invested many hundreds of thousands of dollars to process C Products parts, and the money he was earning from C Products was significant. He told Bergen that he was holding on to some magazines that Marsam had coated as security until the parties resolved the breach and the arrearage.

The defendants invited him to a meeting on August 26, 2008, which Scalise attended in order to work things out. It was a very short meeting, which ended on a contentious note. What Scalise did not know was that the defendants taped the meeting, and their plan was to goad Scalise into repudiating or terminating the contract.[4] Their scheme failed because they recorded themselves prior to the meeting discussing what they would say in order to set up Scalise. Two days after the meeting, the defendants filed a replevin action against Marsam, alleging that their parts were being wrongfully withheld. The action was quickly resolved and withdrawn, but C Products had to pay $200,000 on their delinquent debt and execute a note and mortgage for the balance due before the parts were returned.

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[4] The defendants intended to offer the tape recording at trial, so the parties and counsel listened to the tape during a lunch recess on the second day of trial. The defendants' plan failed because they had inadvertently recorded themselves just prior to the meeting, scripting and scheming how they would set Scalise up. The plaintiff's trial brief is emphatic that defense counsel knew nothing of this "scheme."

Subsequent to the withdrawal of the replevin action, the parties continued to discuss their business relationship, and met at the end of September, 2008. Scalise then learned that C Products was employing a clear Teflon coating which was being processed by other vendors. He repeatedly asked the defendants to furnish him with the specifications so that he could do this for them. He insisted that they honor the contract, but the defendants were evasive and would not furnish the information to Scalise. After two months of receiving no orders from the defendants, and being asked to renegotiate the existing price structure, the plaintiff commenced this action by service of process on October 28, 2008. The defendants have asserted several special defenses to the action which the court will address accordingly and supply further facts as required.

II

DISCUSSION

A. Breach of Contract

The plaintiff claims damages for breach of contract. The plaintiff asserts that on September 12, 2007, a written contract was entered into by the plaintiff and the defendant, C Products, entitled, "OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALING AGREEMENT." (Agreement) (Plaintiff's Exh. 1). C Products agreed that the plaintiff would have the exclusive right to do the anodizing and coating work on all magazines needed by C Products at an agreed upon price from September 1, 2007, to August 31, 2017). (Plaintiff's Exh. 1). The plaintiff contends that C Products began to engage other companies for the

anodizing and coating work at a price less than that provided in the Agreement. Despite the plaintiff's demand that C Products honor its obligations, C Products stopped giving work to Marsam and used other vendors at lower prices. As a result, the plaintiff contends that it has suffered tremendous financial losses for lost profits as well as the expenses it incurred for customized machinery, tooling and upgrades to perform the work for the defendant. In addition, the defendants, Bergen and Panka, personally guaranteed in writing that C Products would duly and punctually perform all of its obligations contained in the Agreement. (Plaintiff's Exh. 2).

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other, and damages." (Internal quotation marks omitted.) *American Express Centurion Bank v. Head*, 115 Conn. App. 10, 15-16, 971 A.2d 90 (2009). "It is a fundamental principle of contract law that the existence and terms of a contract are to be determined from the intent of the parties . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . .the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing] . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." (Citations omitted; internal quotation marks omitted.) *Auto Glass Express v. Hanover Insurance Co.*, 293 Conn. 218, 225-26, 975 A.2d 1266 (2009).

After careful review of all the evidence and corresponding legal principles, the court concludes that the plaintiff has sustained its burden of proof as to a breach of contract claim against C Products, Bergen, and Panka. The court finds the testimony of Scalise to be credible in that a contract was entered into by both the plaintiff and the defendants for exclusive right to the servicing and processing of parts and components manufactured by C Products at specific prices set forth in the Agreement. (Plaintiff's Exh. 1). In addition, the Agreement provided that the plaintiff "is and shall be the exclusive provider of the coating services and process on the parts and components as listed on Schedule A [of the Agreement] *as well as any new or different coating or process*, during the term of the agreement. (Plaintiff's Exh. 1).

One of the defendants' reasons given for utilizing another company to perform its coating processing is that the plaintiff was unable or unwilling to perform the type of coating allegedly demanded by the defendants' customers. There was evidence of three different types of coating introduced at trial: the initial anodizing and coating that Marsam processed from the beginning– moly coat; a new type of coating – Teflon/ceramic hard coat[5] – that Marsam was attempting to introduce into the market; and the "clear coat teflon." The

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[5] Scalise and his plant manager, worked diligently to develop a complicated Teflon/ceramic blend that was painted on, allegedly provided an indestructible coating, and would be unique to the market. This product was introduced at a trade show in Las Vegas in the winter of 2008. The product was put on hold because Bergen and Panka did not want to go through the rigors of the customer approval process. They decided instead to go with the cheaper, easier type of coating – the clear coat Teflon. See, Plaintiff's Exh. 7 and 8).

defendants attempted to confuse the issue between the coating Marsam was working on with the clear coat Teflon, which the defendants' customers were requiring in the summer of 2008. Scalise testified credibly that the clear coat Teflon is the easiest and least expensive of all of those processed by Marsam. When finally asked by the defendants in June, 2009, to utilize this process, within days of receiving a sample and the specifications, Marsam was able to apply an acceptable clear coat Teflon solution to the magazines and parts of C Products. There was no inability or unwillingness on the part of Marsam to provide this type of coating.

The contract was clear, concise and unambiguous. In pursuance of the contract, the plaintiff rendered agreed services to the defendant, performing all of its obligations and requirements. Despite the plaintiff's performance in accordance with the terms of the contract, the defendants breached said contract by failing to honor its obligations under the Agreement.

B. Special Defenses

The defendants have asserted the following special defenses in response to the plaintiff's breach of contract claim: (1) conflict of interest, (2) failure to perform its obligations under the contract, (3) shoddy work or inability to perform the type of coating demanded by defendants' customers; and (4) commercial unreasonableness.[6]

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[6] The defendants' brief addresses the unconscionability of the contract, which the court will assume is the same basis as commercially unreasonable. It does not address the conflict of

1. Conflict of Interest

The defendants allege that "[t]he contract in question was drafted by an attorney who was a principal in the plaintiff [company], who was a principal in the defendant[s'] landlord and who was a member of the firm that represented [defendants]. Accordingly, the contract is the product of a series of unreconciled conflicts of interest and should be declared voidable, if not void." (Defendants' Answer and Special Defenses).

Scalise, the principal in Marsam, has a law degree and holds a license to practice law. His grandfather owned the company, Marsam Metals, and after finishing law school and practicing law for a few years, he has devoted all of his time and energy in Marsam Metals. Although Scalise's father, also an attorney, represented the defendants on the purchase of their building in 2008, Scalise never represented the defendants in his capacity as an attorney either before or after the contract was signed. After discussing the terms of the contract, Scalise reduced it to writing based upon those discussions, and they voluntarily signed it after

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interest special defense, nor the shoddy work or inability to perform defense per se. The defendants also raises the doctrine of impracticability of performance which was not pled, and therefore, the court will not address.

they had ample time to review it or to submit it to an attorney for review. The court finds no conflict.[7]

2. Commercial Unreasonableness.

Although the Uniform Commercial Code, General Statutes Title 42a, (UCC) does not appear to be applicable in this matter, the court may look to the provisions of the UCC as a "useful guide," even where the case at hand does not involve the sale of goods. *Hamm v. Taylor*, 180 Conn. 491, 495, 429 A.2d 946 (1980).

A contract or a provision will be only voided if the court, as a matter of law, finds the contract or any clause of the contract to have been unconscionable at the time that it was made, in light of all the circumstances surrounding the contract. General Statutes § 42a-2-302. Official Comment 1 to Section 2-302 of the Uniform Commercial Code (UCC) suggests, however, that the test is "whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Under that test, the plaintiff's action must be weighed against the defendants' business experience, the business practices of the community, and the relative bargaining power of the parties. (Internal quotation marks omitted.) *Emlee Equipment Leasing*

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[7] Bergen and Panka argued that Scalise forced them to sign the agreement, and "had them over a barrel," at the time the contract was renegotiated. There was no credible evidence to support this claim.

Corporation v. Waterbury Transmission, Inc., 31 Conn. App. 455, 463-4, 626 A.2d 307 (1993). Unconscionability generally requires a demonstration of an absence of meaningful choice on the part of one of the parties together with the contract terms which are unreasonably favorable to the other party. Id.

The defendants contend that the plaintiff was in a superior bargaining position when he presented the 2007 contract to them. There is no evidence to support this contention. In fact, at that point, there was still a contract in place, and the defendants could have continued to perform under that contract, and made alternative arrangements, at the expiration of the first contract, as they were obviously able to do. A long term contract was a reasonable means for the plaintiff to make money for the work performed, recoup its initial investment and also realize a return for the risk inherent in the investment and extension of credit to the defendants.

The exclusivity provision allowed Marsam to do all of the defendants work, and mirrored the parties' actual arrangement and course of dealings over the previous three and a half years. No evidence was introduced to indicate that the prices contained in the Agreement were unreasonable. Because the party claiming unconscionability bears the burden of proof, the defendants would have to offer some evidence and expert testimony to prevail on this special defense. See *Emlee Equipment Leasing Corporation v. Waterbury Transmission, Inc.*, supra, 31 Conn. App. 464. After a review of the evidence, the court finds that the defendant has failed to sustain its burden of proving this special defense.

3. Shoddy work and Inability to Perform under the contract.

There was no credible evidence introduced to support this special defense. Although there was some testimony that several of the parts needed to be repainted, these issues were mostly caused by the defendants. In fact, Bergen indicated that he would "certainly do business with [Marsam] again today and reengage."

The court has previously addressed the issue of the types of coating required by the defendants' customers. Again, there is no evidence to indicate that Marsam was unable or unwilling to perform the type of coating requested by the defendants' customers. It was simply that the defendants *did not communicate their desire to have the clear coat Teflon* coating by Marsam. It is implausible and inconceivable to think that Marsam would risk losing the C Products account by passing on the opportunity to apply the easier, less expensive coating. The court finds that the defendants' did not sustain its burden as to this special defense.[8]

4. Plaintiff's failure to perform under the contract.

The defendants argue that the plaintiff's own conduct breached the agreement in August, 2008, when it "unlawfully" withheld parts, leaving the defendants no choice "but to seek out other coaters while it negotiated payment terms with the [Plaintiff]." This is simply not the case.

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[8]The special defense was not addressed in the defendants' post trial brief.

Two weeks before trial, Bergen appeared at a deposition with a summary or compilation of what was alleged to be all transactions with other vendors in 2008 and 2009. (Plaintiff's Exh. 4). Bergen and Panka continued this "storyline" in their testimony, claimed that the small shipment to a competitor in August was an oversight, and it was Scalise that had brought the relationship to an end. Panka testified they had no choice but to use other vendors: the parts withheld by Scalise would have hurt his company financially and that is why they had to start sending all their business to competitors.

Bergen was issued the same subpoena for trial that he was issued for his deposition two weeks earlier, requesting all invoices, orders, and written evidence of all transactions in 2008 and 2009 with other vendors. The defendants delivered all the invoices at the start of trial in a box in no particular order or sequence, and after the plaintiff had an opportunity to sort through the invoices, it was discovered that, in fact, the defendants had sent more work to various competitors than they set forth in their "summary," previously provided. This defense, based on the secret taping, false disclosure, concealed invoices, and incredible testimony is not a viable defense. The lack of candor and conduct exhibited by the defendants colors their credibility.

C. Damages

The court, having found in favor of the plaintiff, and having found the defendants failed to sustain their burden of proof on any of their special defense, must now address the claim for damages. "It is axiomatic that the burden of proving damages is on the party

claiming them." (Internal quotation marks omitted.) *24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc.*, 239 Conn. 284, 308, 685 A.2d 305 (1996). When the action is not for price or for past services, and damages based on market price are inadequate to put the seller in as good a position as performance would have done, "then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. . ." General Statutes §42a-2-708 (2).

"Proof of damages should be established with reasonable certainty and not speculatively and problematically." (Citations omitted; internal quotation marks omitted.) *Leisure Resort Technology, Inc. V. Trading Cove Associates*, 277 Conn. 21, 35, 889 A.2d 785 (2006). "Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." (Internal quotation marks omitted.) *Cas Construction Company v. Town of East Hartford*, 82 Conn. App. 543, 556, 845 A.2d 466 (2004).

At the conclusion of the trial, the court asked both counsel to stipulate to the number of additional magazines and plates contained in Plaintiff's Exh. 30, since they were not included in the defendants' summary disclosed in Plaintiff's Exh. 4. (See above discussion regarding failure to provide accurate figures by the defendants.) The plaintiff provided Schedule A and B, which the court is attaching to this memorandum, listing the dates and number of each part contained in Exhibit 30, excluding duplicates and rejected batches. There were a total of forty-five separate lots identified; a total of 112,487 plates, and 27,271

magazines.[9]

Scalise testified, without objection, regarding his costs, overhead and profit. The testimony was factual in nature and provided the court with sufficient detail to calculate damages without the need for the skill, expertise, and assistance of an expert witness. See *Bead Chain Manufacturing v. Saxton Products, Inc.*, 183 Conn. 266, 279, 439 A.2d 314 (1981). Scalise demonstrated sufficient experience, skill, and knowledge to provide testimony on the costs and profits associated with the anodizing and coating process.[10] The evidence produced shows the exact number of plates and magazines that the plaintiff should have performed work on and for which it should have received compensation.

Floor plates:	1,933,187 x .08 profit per part =	$154,654.96
Magazines:		
Dry film ("moly"):	106,277 x .58 profit per part =	$61,640.66
Clear coat teflon:	1,466,308 x .80 profit per part =	$1,173,046.40
	TOTAL:	$1,389,341.90

The court finds that the Plaintiff has met its burden of proving by a fair preponderance of the evidence its entitlement to recover damages in the amount of $1,389,341.90. The court credits the testimony of Scalise regarding the specifics of the profit margins. In accordance

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[9]These numbers are significantly more that a "needle in the haystack."

[10] Scalise did not simply base his calculation of damages by applying a percentage formula to the prices charged by his competitors. He explained in detail how he priced his jobs, as well as how he maintained at least a thirty-five to forty percent margin over costs in all transactions. His testimony provided the court with a reasonable and fair way to calculate the damages without any speculation or guessing.

with all the evidence presented, the court awards damages in the amount of $1,389,341.90.

III

CONCLUSION

For the foregoing reasons, the court finds for the plaintiff on both counts, as awarded damages in the amount of $1,389,341.90.

Swienton, J.

SCHEDULE A

MODERN METAL ORDERS FOR FLOOR PLATES IN AUGUST 2008

Invoice Number	Date	Quantity	Item
69074	8/6/08	6380	Floor Plate
69117	8/7/08	1310	Floor Plate
69109	8/7/08	2407	Floor Plate
69107	8/7/08	1622	Floor Plate
69182	8/11/08	2143	Floor Plate
69175	8/11/08	3676	Floor Plate
69215	8/12/08	11110	Floor Plate
69237	8/13/08	9700	Floor Plate
69270	8/14/08	12252	Floor Plate
69271	8/14/08	598	Floor Plate
69304	8/15/08	5902	Floor Plate
69306	8/15/08	3310	Floor Plate
69328	8/18/08	8906	Floor Plate
69372	8/19/08	685	Floor Plate
69361	8/19/08	14804	Floor Plate
69413	8/20/08	2042	Floor Plate
69486	8/22/08	9430	Floor Plate
69522	8/25/08	3700	Floor Plate
69521	8/25/08	2010	Floor Plate
69565	8/26/08	5130	Floor Plate
69590	8/27/08	5370	Floor Plate
	Total	**112487**	

SCHEDULE B

MODERN METAL ORDERS FOR MAGAZINES IN AUGUST 2008

Invoice Number	Date	Quantity	Item
69098	8/7/08	770	Magazines
69110	8/7/08	233	Magazines
69148	8/8/08	660	Magazines
69171	8/11/08	1390	Magazines
69329	8/18/08	1061	Magazines
69308	8/15/08	1037	Magazines
69303	8/15/03	110	Magazines
69371	8/19/08	297	Magazines
69411	8/20/08	70	Magazines
69412	8/20/08	220	Magazines
69414	8/20/08	605	Magazines
69491	8/22/08	1449	Magazines
69520	8/25/08	1445	Magazines
69549	8/26/08	2250	Magazines
69566	8/26/08	5130	Magazines
69573	8/27/08	750	Magazines
69574	8/27/08	1272	Magazines
69581	8/27/08	648	Magazines
69587	8/27/08	352	Magazines
69620	8/28/08	1000	Magazines
69619	8/28/08	292	Magazines
69618	8/28/08	1928	Magazines
69651	8/29/08	159	Magazines
69648	8/29/08	2898	Magazines
69653	8/29/08	1245	Magazines
	Total	**27271**	